86-1086

Supreme Court, U.S.
FILED
DEC 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER 1986 TERM

STACEY LYNN MERKT and
JOHN B. ELDER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

STEPHEN W. COOPER
Neighborhood Justice Center
500 Laurel Avenue
St. Paul, MN 55102
Attorney of Record for Petitioners
MICHAEL TIGAR
Professor, University of Texas Law School
C. PETER ERLINDER
Professor, William Mitchell College of Law

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

APPENDIX

TABLE OF CONTENTS

I. Order of the Honorable Judge Vela, Trial Judge, adopting the Opinion of the Honorable Judge Head as controlling on Petitioner's Motions to Dismiss, particularly, First Amendment - Religion.

II. Opinion of the Honorable Judge Head regarding Motions to Dismiss First Amendment - Religion.

III. Opinion of the Panel of the United States Court of Appeals for the Fifth Circuit.

IV. Denial of Suggestion for En Banc Review.

V. Motion to the Fifth Circuit to comply with rules regarding En Banc Review and Recall of Mandate denied.

VI. Extension to December 3, 1986 to file Petition for Certiorari granted by the Honorable Justice Byron White.

I

Order of the Honorable Judge Vela, Trial Judge, adopting the Opinion of the Honorable Judge Head as controlling on Petitioner's Motions to Dismiss, particularly, First Amendment - Religion.

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
F I L E D
FEB 22, 1985
JESSE E. CLARK, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
VS.	§	CR. NO. B-84-746
STACEY LYNN MERKT JOHN B. ELDER	§	

O R D E R

Defendants have filed several pre-trial motions in the above entitled and numbered cause which raise identical legal issues presented in United States of America v. John B. Elder, Cr. No. B-84-276.

Therefore, it is ORDERED that the attached Opinion on Motions to Dismiss and the evidence adduced at the hearings therein be and the same is hereby adopted for all purposes and made a part of this record. The Defendants preserve their exception.

The Clerk shall send a copy of this Order to all counsel.

DONE at Brownsville, Texas this 22 day of February, 1985.

FILEMON B. VELA
United States District Judge

II

Opinion of the Honorable Judge Head regarding Motions to Dismiss First Amendment - Religion.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
V.	§	CR. NO. B-84-276
JOHN B. ELDER	§	

OPINION ON MOTIONS TO DISMISS

I. INTRODUCTION

The United States accused the Defendant John B. Elder of unlawfully transporting three undocumented Salvadoran aliens in violation of 8 U.S.C. § 1324(a)(2). Elder filed various motions to dismiss, including motions based on freedom of religion, domestic and international refugee law, selective prosecution, and estoppel. He also filed a motion to suppress based on an allegedly improper showup. After extensive pretrial evidentiary hearings, the Court, in open court, denied all motions to dismiss and the motion to suppress. This opinion discusses only those motions which the Court feels are sufficiently unique to merit a written opinion.

II. FACTS

Elder is the director of the Casa Oscar Romero (Casa Romero), named in honor of the assassinated Roman Catholic Archbishop of El Salvador. Casa Romero, located in San Benito, Cameron County, Texas, provides assistance and shelter to Central Americans, principally Salvadorans, who have fled Central America and entered the United States. Elder considers these persons "refugees" under the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102, and international law. Elder regards Casa Romero as a sanctuary in the biblical sense. The testimony indicated that the Casa Romero was founded in December, 1982, on land donated by the Roman Catholic Diocese of Brownsville. Parishes and congregations of various religious affiliations donated seed money and continue to provide financial support for the Casa Romero. The Roman Catholic Diocese of Brownsville plays a financial and leadership role in the operation of the Casa Romero.

On March 12, 1984, Elder transported three undocumented Salvadorans six miles from the Casa Romero to a bus station in Harlingen,

Texas, within the Rio Grande Valley. Without permission or documentation, these aliens together had entered the United States earlier that same day in the vicinity of the Matamoros-Brownsville International Bridge. The Salvadorans then walked twenty-five miles to San Benito, where they were directed to the Casa Romero. After they ate and rested at the Casa Romero, the Salvadorans asked Elder for a ride to the Harligen bus station. The Salvadorans planned to go north to Houston on the bus through the Border Patrol checkpoint located north of Harlingen on U.S. Highway 77. Elder complied with the Salvadorans' request by taking them to the Continental Trailways Bus Station in Harlingen. Elder knew of the Salvadorans' plan to go to Houston.

Two Border Patrol agents saw the three Salvadorans get out of Elder's vehicle in front of the bus station. After the agents recorded the license plate number of the vehicle the agents detained the Salvadorans and took them to the Harlingen Border Patrol office. A license plate check revealed that the car was registered to Elder. An agent of the Immigration

and Naturalization Service (INS) later returned the Salvadorans to the Casa Romero, where the Salvadorans identified Elder. At the pretrial evidentiary hearing, the Salvadorans and the Border Patrol agents identified Elder as the driver of the vehicle.

III. MOTION TO DISMISS - FREEDOM OF RELIGION

Elder contends that his First Amendment right to exercise religion entitles him to put into practice his religious beliefs, which includes providing shelter and transportation for Salvadoran aliens, even if those practices clash with the statutory prohibitions of 8 U.S.C. § 1324(a)(2). Courts have recognized that the exercise of religious freedom can sometimes excuse criminal conduct, see Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972); People v. Woody, 61 Cal.2d 716, 40 Cal. Rptr. 69, 394 P.2d 813 (1964); however, the Supreme Court has determined that the enforcement of criminal laws can be constitutionally achieved even if the laws interfere with the religious practices of individuals. See Cantwell v.

Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940); Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S. Ct. 438 (1944); Reynolds v. United States, 98 U.S. 145 (1878). The First Amendment "embraces two concepts--freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. Connecticut, 310 U.S. at 303-04, 60 S. Ct. at 903.

Recent court decisions describe the appropriate analysis to resolve the conflict between the prohibitions of a criminal statute and the perceived mandates of religious practice. Elder bears the initial burden to demonstrate that religious beliefs motivated his conduct. The burden then shifts to the Government to justify placing limitations on the religious conduct. The Government must show that such limitations are essential to accomplish a compelling governmental interest. The limitation on religion must not exceed the least burdensome method of accomplishing the Government's purpose without infringing First Amendment rights.

Peyote Way Church of God, Inc. v. Smith. 742 F.2d 193, 200 (5th Cir. 1984); see United States v. Lee, 455 U.S. 252, 102 S. Ct. 1051 (1982); Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526 (1972).

When a defendant presents evidence to meet his initial burden, the Court must be careful and deferential in examining the Defendant's beliefs. The Supreme Court notes that the determination of what constitutes a religious belief or practice presents "a most delicate question." Wisconsin v. Yoder, 406 U.S. at 215, 92 S. Ct. at 1533. The Court should neither interpret canon law nor define the parameters of a religion. See Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 715-16, 101 S. Ct. 1425, 1430-31 (1981).

The Court finds that Elder has met his initial burden. He is a Roman Catholic who feels a charitable Christian commitment, founded in the Gospel, which motivates him to assist those who flee the violence in El Salvador. Elder presented the testimony of various Christian

clergymen who confirmed that assistance to those in need remains a fundamental aspect of Christianity. Bishop John Fitzpatrick, Bishop of the Roman Catholic Diocese of Brownsville, testified that meeting material human needs represents an essential aspect of Christianity, and that each individual remains free to fulfill this obligation according to the directives of his or her own conscience. Although no law of the Roman Catholic Church specifically requires Roman Catholics to provide sanctuary or rides to Salvadorans, Bishop Fitzpatrick believes that providing such assistance constitutes an appropriate expression of the Christian gospel. According to the testimony of the various ministers, this conclusion also holds true in other denominations. These ministers included Donovan Cook of the American Baptist Church, James Andrews of the Presbyterian Church, John Steinbrook of the Lutheran Church, and Gilbert Dawes and John Soper of the United Methodist Church. The Government called no witnesses to oppose the testimony of these ministers.

Elder feels a religious commitment to assist Salvadorans because of the political turbulence in that country. An insurgent movement currently exists in El Salvador which continues to battle government forces. Elder filed numerous statements from alleged eyewitnesses who describe a brutal situation in El Salvador. According to these statements and testimony in court, the conflict in El Salvador has resulted in much violence and many atrocities directed at the civilian population from both sides. The testimony contains graphic descriptions of torture, murder, brutalities, and disappearances. The violence has included church workers among its victims.

Although the Court has no reasons to doubt the description of tragedy and horror in El Salvador, the Court need only find that Elder believed that such violence actually occurred. This Court has no responsibility to make factual findings concerning the situation in El Salvador. The Court need not make any foreign policy judgments in order to conclude that, in assisting the Salvadorans, Elder acted in accordance with his personal view of Christianity. The Bishop of

the Brownsville Diocese believes that Elder is a religious man who practiced his Roman Catholicism when he transported the Salvadorans. According to the Bishop, as a practicing Roman Catholic, the expression of Elder's inner religious thoughts can properly be evidenced by charitable social action, such as assistance to undocumented Central Americans.

The Court understands that other members of the Roman Catholic faith may oppose Elder's activist response to the situation in Central American. The Court emphasizes that it is not an arbiter of canon law. The Court simply finds that Elder fulfilled his Christian obligations as he genuinely perceived them to be and that Elder presented substantial testimony to support his view of Christianity. This Court's conclusions are not intended to define the Christian gospel or Christian response to it. The Court need not correctly interpret Christian doctrine in order to hear the position of the Defendant.

Because Elder meets his initial burden, the Government must show an overriding interest to justify prosecution. The Court finds that

the Government meets its burden to demonstrate an overriding interest in protecting a congressionally-sanctioned immigration and naturalization system designed to maintain the integrity of this Nation's borders. In discussing the importance of United States' immigration laws, the Supreme Court has repeatedly emphasized the importance which sovereign nations place upon controlling entry through their borders. In Kleindienst v. Mandel, 408 U.S. 753, 765, 92 S. Ct. 2576, 2583 (1972), the Supreme Court agreed that controls over immigration are "inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers--a power to be exercised exclusively by the political branches of government ..." In Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977), [quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339, 29 S. Ct. 671, 676 (1909)], the Supreme Court underscored the limited role of the judiciary with respect to immigration and reemphasized that "'over no conceivable subject is the legislative power of Congress more complete

than it is over' the admission of aliens."

The ability to control entry and to identify those admitted remains vital to the welfare and security of the people. See The Japanese Immigrant Case, 189 U.S. 86, 96-97, 23 S. Ct. 611, 613 (1903); Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 123-24, 87 S. Ct. 1563, 1567 (1967). Circumvention by individuals of the congressionally-prescribed procedure for entry, even if religiously motivated, undermines the historically legitimate goals of immigration control. Protection of the borders represents a national obligation fulfilled by the Government for the benefit of all Americans. See The Chinese Exclusion Case, 130 U.S. 581, 603-07, 9 S. Ct. 623, 629-30 (1889). Elder's do-it-yourself immigration policy, while charitable, gives away what is not his to give away--the Government's legitimate right to examine every person who enters the country so that the Government can make informed decisions on who will be admitted.

The United States retains interests in immigration control for security reasons. Richard Casillas, District Director for the INS

in San Antonio, Texas, explained that potential immigrants must submit a biographical data sheet for review by law enforcement agencies. The goal of this system of immigration control is to prevent entry by enemies of the state, criminals, and other classifications of immigrants which Congress determines to be undesirable. Without a functional system, the country remains unable to inquire and therefore powerless to control. The INS also faces problems with counterfeit identification and documentation obtained by aliens who wish to assimilate into American society. Casillas testified that the INS recently redirected its limited resources to deal with the growing problem of undocumented aliens who make fraudulent applications to receive benefits under entitlement programs.

The parties presented conflicting evidence concerning the beneficial or harmful impact exerted by undocumented workers upon the labor market and the national economy. David North, an immigration researcher who testified for the Government, concluded that undocumented aliens drained social resources, depressed wages, displaced minority and women workers, and impeded

technological development in some sectors of the economy. Thomas Muller, an expert for the defense, found that undocumented immigrants filled unwanted jobs and helped to create new jobs and prosperity. Another defense expert, Gilberto Cardenas, testified that undocumented aliens adversely affected local funds for social services, but that the State of Texas as a whole received a net benefit from contributions paid by undocumented aliens into the state's social programs. This existing controversy among experts proves, first, that the economic impact of illegal immigration remains unresolved and, second, that the Court should not resolve the dispute. As long as the issue persists, Congress remains entitled to examine the immigration question and to pass legislation to address the problems which Congress discovers. Congress may direct the executive to account for each individual who enters the country and to make appropriate decisions in the best interest of all Americans.

The Court must also analyze whether

the Government utilizes the least burdensome method to accomplish its purpose in securing the Nation's borders. The Court finds that the Government must retain the sole authority to determine who may cross the borders or travel further within the country. If the Government attempted to accommodate into its immigration policy Elder's religious beliefs, the Government's efforts would result in no immigration policy at all. As testimony from Defendant's witnesses indicated, the moral obligation to assist others crosses religious and denominational lines. These widely-held beliefs allow adherents to exercise considerable discretion and would permit religious individuals to form personal immigration policies. See United States v. Lee, 455 U.S. at 259-60, 102 S. Ct. at 1056-57. Elder wishes to limit this Court's view solely to the violence in El Salvador; however, the human condition remains miserable in many parts of the globe. Man's inhumanity to man, as well as nature's, has been unrelenting throughout history. Many people live on this planet who logically are no less worthy of Elder's

Christian charity than the Salvadorans. The consciences of others religiously motivated may conclude that the starving and impoverished of North Africa, Asia, or Mexico are equally entitled to enter this country without review by the INS.

Obviously all cannot enter. Congress has recognized in its immigration policy that the United States cannot absorb all who wish to enter this country to take advantage of its relative tranquility and bounty. Congress has therefore established appropriate standards and procedures by which to determine proper entry. The Government, as the representative of all Americans, must retain the sole authority and responsibility to make these hard decisions and has put a system into place which individuals, without regard to their motivations, cannot be allowed to evade. See The Chinese Exclusion Case, 130 U.S. at 603-09, 9 S. Ct. at 629-31.

The United States accepts applications for asylum from all nationalities, including Salvadorans, under a procedure which takes into account the social and political conditions

which exist in their homelands. See generally Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102. Title 8 U.S.C. § 1158(a) authorizes the Attorney General to establish a procedure for asylum, see 8 C.F.R. §§ 208.1-208.16 (1984), which provides protection to applicants who fall under the statutory definition of refugee. Title 8 U.S.C. § 1101(a)(42)(A) includes as refugees those persons unable or unwilling to return to their native countries "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion ..." A potential refugee may enter the country and apply for asylum with the local District Director of the INS. See 8 C.F.R. § 208.3(a). All potential refugees also receive the opportunity to submit applications for asylum during exclusion or deportation proceedings before an immigration judge. See C.F.R. §§ 208.3(a), 208.9. Those denied asylum by an immigration judge may appeal the decision within the INS. The testimony indicates that some Salvadorans have petitioned for and

received asylum. Petitioners who are denied asylum have recourse to all levels of the federal courts for review of the decision, see Ramirez-Osorio v. Immigration and Naturalization Service, 745 F.2d 937, 946 n. 15 (5th Cir. 1984), including the United States Supreme Court. See Immigration and Naturalization Service v. Stevic, ___ U.S. ___, 104 S. Ct. 2489 (1984).

This Court finds that implementation of the immigration laws represents an important Government interest which, on balance, justifies enforcement of § 1324(a)(2) against Elder. The Court also finds that the Government utilizes the least burdensome method by which to accomplish its goals, especially since nothing in this decision prohibits the exercise of Christian charity to those who present themselves before the INS to apply for asylum and who proceed under INS rules. See United States v. Pereira-Pineda, 721 F.2d 137 (5th Cir. 1983). The Court accordingly denies the motion to dismiss based on free exercise of religion.

IV. MOTIONS TO DISMISS UNDER DOMESTIC AND INTERNATIONAL LAW

Elder introduces various motions to dismiss based on domestic and international refugee law. Elder's motions based on domestic law essentially argue that 8 U.S.C. § 1253(h) entitled the Salvadoran aliens that he transported to remain in the United States because they fall under the definition of refugee. Section 1253(h), as amended by the Refugee Act of 1980, provides that the Attorney General "shall not deport or return any alien... to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Elder asserts that because the Salvadorans he transported qualified for protection as refugees, the Government cannot prove that the aliens were present unlawfully, an essential element of § 1324(a)(2). See United States v. Shaddix, 693 F.2d 1135, 1137-38 (5th Cir. 1982). The Defendant argues that his assistance to the Salvadorans remained perfectly legal, and he

requests dismissal of the indictment.

The Court refuses the invitation to circumvent the statutory scheme and declines to dismiss the indictment. Fifth Circuit law clearly holds that before Salvadoran aliens may reside legally within this country they must submit applications for asylum with the Government. United States v. Pereira-Pineda, 721 F.2d 137 (5th Cir. 1983); see Martinez-Romero v. Immigration and Naturalization Service, 692 F.2d 595, 595-96 (9th Cir. 1982). The Defendant essentially asks the Court to make a finding of fact concerning the refugee status of the Salvadorans. Title 8 U.S.C. § 1158 and § 1253(h), however, authorize the Attorney General to determine the refugee status of an individual. The statutes do not permit either the Court or the Defendant to determine the refugee status of the Salvadorans nor can the Court submit such an issue to a jury. Under the statutory scheme, the decision lies exclusively with the Attorney General, subject to appropriate avenues of judicial review. See Ramirez-Osorio v. Immigration and Naturalization Service,

745 F.2d 937, 946 n. 15 (5th Cir. 1984).

The Defendant also argues that international laws and treaties automatically entitle the aliens to receive refugee status without regard to our own national laws. The Court concludes that Congress intended the Refugee Act of 1980 to fulfill its obligations under international law, see Immigration and Naturalization Service v. Stevic, ___ U.S. ___, 104 S. Ct. 2489 (1984), and this Act designates the Attorney General to determine refugee status. Congress also indicated that the Government should review applications from Salvadorans on a case-by-case basis. See Pub.L. 97-113, § 731, 95 Stat. 1519. The Court cannot interfere with political decisions which the United States as a sovereign nation chooses to make in the interpretation, enforcement, or rejection of treaty commitments which affect immigration. See The Chinese Exclusion Case, 130 U.S. 581, 9 S. Ct. 623 (1889); Botiller v. Dominguez, 130 U.S. 238, 247, 9 S. Ct. 525, 527 (1889); Fiallo v. Bell, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977); 74 Am. Jur. 2d Treaties §§ 14, 36 (1974). The Court

accordingly denies Defendant's motions to dismiss under domestic and international refugee law.

ORDERED this 13th day of February, 1985.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

III

Opinion of the Panel of the United States Court of Appeals for the Fifth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STACEY LYNN MERKT and JOHN B. ELDER,
Defendants-Appellants.

No. 85-2264

OPINION

Filed July 17, 1986

Before: Jerre S. Williams, Will Garwood, and Edith H. Jones, Circuit Judges.

Opinion by Judge Edith H. Jones

Appeal from the United States District Court
for the Southern District of Texas
Filemon B. Vela, District Judge, Presiding

SUMMARY

Immigration and Naturalization/Criminal Law

Appeal from judgments of conviction. Affirmed.

Defendants were convicted of conspiracy in connection with the smuggling of illegal aliens. The charges arose from the arrest of an El Salvadorian man and woman who had entered the country illegally. They told U.S. Border Patrol agents that one of the defendants had met them at the border and driven them to a sanctuary where they stayed for approximately fifteen days. At the sanctuary, they sometimes saw that defendant and also met the other defendant who was a volunteer there.

[1] The free exercise clause of the first amendment embraces two concepts, freedom to believe and freedom to act. The first is abso-

lute but the second is not. Legislation, religiously neutral on its face, may regulate the health, safety, and general welfare of the public, or certain activities within the purview of the federal government, even if individuals will thereby be penalized because the practice of their religious doctrine violates the law. [2] The strong interest of the government in controlling its own borders is alone sufficient reason to deny defendants' claims of immunity from prosecution under the free exercise clause of the first amendment. [3] The Supreme Court has, at times, applied a balancing test to free exercise claims. The test requires examining the extent of the burden posed on a defendants' religious practice, the interest of the government in uniform law enforcement, and the likelihood that the government could enforce its policy by other, less intrusive means. It is unclear what situations require the use of this test and, therefore, exhibiting caution, this court will complete the analysis. [4] Here, it is unclear how the criminal offense unduly burdens defendants' free exercise of religion. There was no evidence presented at the pre trial hearing or at the trial that suggested that devout Christian belief mandates participation in the sanctuary movement. [5] Contrary to defendants' arguments, the state does have a compelling interest in the uniform enforcement of border control laws. The interest in uniform application of a facially neutral criminal law is acute. The compelling state interest, moreover, becomes more compelling in proportion to the increasing magnitude of the violations. [6] Defendants' proffered less restrictive alternatives, by their very triviality, highlight the necessity for criminal sanctions. A further objection to requiring the government to adopt less restrictive alternatives that would protect defendants' religious practices is the open-endedness of their demand.

[7] Evidence of a pretrial identification will be inadmissible only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. The district court was not clearly erroneous in its determination that the male photographic array was unnecessarily suggestive. [8] The government concedes that the female photographic array was impermissibly suggestive. The court must determine, therefore, whether under the totality of the circumstances, the suggestiveness led to a substantial likelihood of irreparable misidentification. A review of a number of factors indicates a reliable basis for the identification. [9] A motion for recusal is com-

mitted to the sound discretion of the trial judge and will not be reversed on appeal unless the judge has abused his discretion. The alleged bias or prejudice must be personal and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Here, defendants have not shown, by affidavit or otherwise, that the judge's impartiality might reasonably be questioned or that he had a personal bias or prejudice against either defendant.

[10] The admission at trial of a coerced out of court statement from a non defendant may violate the defendant's right to a fair trial as guaranteed by the due process clause of the fifth amendment. The voluntariness of the statement of a witness is generally determined in a pretrial suppression hearing. [11] Here, the facts presented at trial did not warrant an evidentiary hearing on the issue of voluntariness. [12] Evidence of other crimes is not admissible to prove character of a person in order to show that she acted in conformity therewith. A trial court's decision to admit extrinsic offense evidence will be rejected only for an abuse of discretion. Extrinsic offense evidence is particularly probative in a conspiracy case to show intent or knowledge. Only when a defendant affirmatively takes the issue of intent out of the case is he entitled to an exclusion of the evidence. [13] The court must make an on the record determination that the probative value outweighs the prejudicial effect before admitting extrinsic offense evidence. The requirement of a prior on the record articulation is only triggered by the request of the party.

[14] It is unlawful for a person to assist an alien who is not lawfully entitled to enter or reside within the United States. Since the aliens' status is an element of the crime charged, the defendants assert that whether the aliens are refugees entitled to remain in the United States is a question of fact which should have been submitted to the jury. Even if the aliens are refugees under the United Nations Protocol Relating to the Status of Refugees, they are not permitted to reside here contrary to domestic law. [15] The government must prove that the defendants acted wilfully in furtherance of the aliens' violation of the law. Mere or incidental transportation of an alien is not sufficient to sustain a conviction. The court's instruction to the jury substantially covered that requested by

defendants and, in substance, embodied the above principles. [16] Having reviewed all the evidence in the light most favorable to the government, the court concludes that it was sufficient to sustain the convictions.

OPINION

EDITH H. JONES, Circuit Judge:

In August 1984, Jose Andres Mendez-Valle and Maria Calletano Rosales-Cruz, El Salvadoran citizens, along with three El Salvadoran juveniles (hereinafter collectively referred to as "illegal aliens" or "aliens") left El Salvador.[1] Having reached Saltillo, Mexico, by bus, Mendez-Valle contacted relatives in Washington, D.C., who instructed him to remain in Mexico until further notice. Several weeks later, two American women came and took the aliens to a church in Matamoros, Mexico, near the Rio Grande River. The aliens spent the night at the church and, the following morning, a man escorted them to the river and directed them to cross at a point where the appellant, John B. Elder, was waiting on the other side.

Once in the United States, Elder drove the illegal aliens to the self-styled sanctuary, Casa Oscar Romero, in San Benito, Texas, where they remained for approximately fifteen days. While at Casa Oscar Romero, Mendez-Valle occasionally saw Elder, who directed the house, and also became acquainted with the appellant, Stacey Lynn Merkt, a volunteer there, when Mendez-Valle gave her money to buy the aliens bus tickets to Houston.

In the early morning hours of November 21, Mendez-Valle was given five bus tickets. Merkt drove the aliens to the bus station in McAllen, Texas, where they were directed to the proper bus. En route to Houston, the bus stopped in Weslaco. There, U.S. Border Patrol agents boarded the bus to check for illegal aliens. Mendez-Valle, Rosales-Cruz, and the three juveniles were arrested, given *Miranda* warnings, and taken to the Border Patrol station in Mer-

[1]We recite the facts, as we must, in the light most favorable to the government and the jury's verdict. *See United States v. Alvarado Garcia*, 781 F.2d 422, 423 & n.1 (5th Cir. 1986).

cedes, Texas. There, the agents learned that the aliens might have been smuggled into the United States. Accordingly, after initial processing, the aliens were sent to the Anti-Smuggling Unit in McAllen.

At the Border Patrol station in McAllen, Mendez-Valle generally described and later indentified both Elder and Merkt. Rosales-Cruz was not able to identify either defendant from a photographic line-up.

Elder was indicted, charged, and convicted of two counts of conspiracy, two counts of bringing in and landing illegal aliens, in violation of 8 U.S.C. § 1324(a)(1), and two counts of transporting illegal aliens, in violation of 8 U.S.C. § 1324(a)(2).[2] Merkt, indicted on one conspiracy count and two substantive transportation counts, was found guilty only of the conspiracy count. The appellants challenge their convictions on numerous grounds which we, after careful consideration, reject.

---

[2]Section 1324(a) sets forth the conditions under which persons can be found liable for bringing in and harboring illegal aliens:

> Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—
>
> (1) brings into or lands in the United States, by any means of transportation or otherwise, or attempts, by himself or through another, to bring into or land in the United States, by any means of transportation or otherwise; [or]
>
> (2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law.
>
> • • • •
>
> any alien . . . not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens shall be guilty of a felony . . . .

8 U.S.C. § 1324(a)(1), (2).

I.

FREE EXERCISE CLAIM

Appellants contend that their convictions are barred by their religiously motivated "sanctuary" activities for El Salvadorans, which give rise to first amendment immunity from punishment for violating 8 U.S.C. § 1324.

American society extols its tradition as a haven for those to whom obligations or piety and conscience rank higher than the goods of this world. The tradition, at one level, was embodied in the "free exercise" clause of the Bill of Rights. While respecting the rights of citizens to adhere to different religions, however, it has never been doubted that the government's duty to all may, in some circumstances, encroach upon the practices of a few. Appellants Merkt and Elder seek sanctuary in the "free exercise" clause against their violation of national border control laws. This court, whose sanctuary power is rigidly controlled by precedent, cannot grant their request.

[1] The Supreme Court in *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), noted that the free exercise clause

> embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Id. at 303-04, 60 S.Ct. at 903, 84 L.Ed. at 1218 (footnote omitted). Following the dichotomy, a significant body of Supreme Court law has explained that legislation, religiously neutral on its face, may regulate the health, safety, and general welfare of the public, or certain activities within the purview of the federal government, even if individuals will thereby be penalized because the practice of their religious doctrine violates the law. *See Sherbert v. Verner*, 374 U.S.

398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965, 970 (1963). *See, e.g., Braunfeld v. Brown*, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (Sunday closing laws); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) (child labor laws); *Davis v. Beason*, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637 (1890) (voter registration laws); *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244 (1878) (polygamy laws). In *Gillette v. United States*, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971), the Supreme Court found unconvincing a "free exercise" claim to exemption from compulsory military service by petitioners who conscientiously objected only to the Vietnam war. The government held an overriding interest in raising armies, and the exemption was theologically neutral. *Id.* at 462, 91 S.Ct. at 842-43, 28 L.Ed.2d at 188. In *Goldman v. Weinberger*, ___ U.S. ___, 106 S.Ct. 1310, 1314, 89 L.Ed.2d 478, 485 (1986), the Court, relying on the special needs of the armed forces for uniformity and discipline, upheld a religiously neutral Air Force regulation the effect of which was to forbid an orthodox Jewish serviceman to wear a yarmulke.

The lower federal courts have consistently refused to create free exercise havens from violation of the national criminal laws against use and sale of marijuana. *See United States v. Rush*, 738 F.2d 497, 511-13 (1st Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1355, 84 L.Ed.2d 378 (1985); *United States v. Middleton*, 690 F.2d 820, 824-26 (11th Cir. 1982), *cert. denied*, 460 U.S. 1051, 103 S.Ct. 1497, 75 L.Ed.2d 929 (1983); *Leary v. United States*, 383 F.2d 851, 859-61 (5th Cir. 1967), *rev'd in part and remanded on other grounds*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969). Likewise, criminal laws prohibiting destruction of government property, *United States v. Allen*, 760 F.2d 447, 453 (2d Cir. 1985), extortion, *United States v. Starks*, 515 F.2d 112, 124 (3d Cir. 1975), *aff'd in relevant part sub nom. Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977), racketeering, *United States v. Dickens*, 695 F.2d 765, 772-73 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092, 103 S.Ct. 1792, 76 L.Ed.2d 359 (1983), and refusal to testify before a grand jury, *Smilow v. United States*, 465 F.2d 802, 804-05 (2d Cir.), *vacated and remanded on other grounds*, 409 U.S. 944, 93 S.Ct. 268, 34 L.Ed.2d 215 (1972), have been enforced against pleas for preferment based on "free exercise". The basis for these decisions was the conclusion that "the very concept of ordered liberty precludes allowing every person to make his own standards on mat-

ters of conduct in which society as a whole has important interests." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15, 25 (1972).

[2] Enforcement of 8 U.S.C. § 1324 cannot, consistent with this authority, brook exceptions for those who claim to obey a higher authority. The prohibition on the landing and transport of illegal aliens represents but one facet of the comprehensive legal framework governing entry into the United States and admission to its citizenship. The importance of the prohibition is reflected in the criminalization of conduct, as opposed to milder enforcement sanctions. Control of one's borders and of the identity of one's citizens is an essential feature of national sovereignty.[3] Relinquish this control and it may fairly be said that there remains no territorial or social body which can be called a sovereign nation. The peace, order, and very existence of society are bound up in its border control laws as much as in its criminal and conscription laws. Although their scope and application may be justly criticized, there can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed. On this basis alone, the first amendment challenge of Merkt and Elder to their convictions fails.

[3] The appellants urge us to apply the analysis of *Wisconsin v. Yoder* and *United States v. Lee*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982) to their case, which would require examining the extent of the burden imposed on their religious practices, the interest of the government in uniform law enforcement, and the likelihood that the government could enforce its policy by other, less intrusive means. At the outset, we note that in *Lee* the government prevailed, even under this analysis, in requiring the Amish, against their religious dictates, to contribute to the federal Social Security system. Moreover, *Yoder* and *Lee* explicitly excluded from their analysis legislation governing the public safety, peace, and order. Despite the Court's recent fragmentation of opinions in

[3]The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S.Ct. 625, 628, 97 L.Ed. 956, 961 (1953). *See also Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50, 56 (1977).

Bowen v. Roy, ___ U.S. ___, 106 S.Ct. 2147, ___ L.Ed.2d ___ (1986), the controversy there focused on whether to apply *Yoder* or a less-stringent standard to the collision between a free exercise claim and the receipt of federally funded welfare benefits. Justice Burger's opinion for the plurality in result, favorably cited *Reynolds*, which earlier rejected a free exercise challenge against laws prohibiting polygamy, and was not disputed on this point. Nevertheless, in an abundance of analytical caution, we reach the same result even under the *Yoder* test.

[4] First, it is not clear to us how enforcement of 8 U.S.C. § 1324 unduly burdens appellants' free exercise of religion. *See Braunfeld*, 366 U.S. at 606-07, 81 S.Ct. at 1147-48, 6 L.Ed.2d at 568-69. The statute relates only to conduct that aids or shelters illegal aliens and contains no explicit prohibition on religious practices or beliefs. The sincerity of appellants' religious motivation to aid El Salvadorans was not doubted by the trial court. Whether such motivation, in turn, required defiance of the nation's border control laws, hence, whether enforcement of those laws so as to inhibit and punish appellants burdened their religious practice, is another matter. Representatives of Catholic and Methodist clergy testified at the pretrial hearing and at trial. None suggested that devout Christian belief mandates participation in the "sanctuary movement." Obviously, appellants could have assisted beleaguered El Salvadorans in many ways which did not affront the border control laws: they could have collected and distributed monetary and other donations, aided in preparing petitions for legal entry and assisted El Salvadorans legally in this country, or, in the Christian missionary tradition, they could have performed their ministry in El Salvador or neighboring countries where El Salvadorans are refugees. They *chose* confrontational, illegal means to practice their religious views —the "burden" was voluntarily assumed and not imposed on them by the government.

[5] Second, contrary to appellants' assertions, there is a compelling state interest in the government's uniform enforcement of border control laws. The statute under which appellants were convicted is part of a comprehensive, essential sovereign policy. We cannot engraft judicial exceptions to the illegality of transporting undocumented El Salvadorans without thereby *de facto* revising, for the unique benefit of El Salvadorans, the legal condi-

BEST AVAILABLE COPY

tions under which they may abide in this country. This result would create a preference utterly at odds with the fine balancing of national-origin quotas, visa preference tables, and alien residency requirements promulgated and enforced pursuant to the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. §§ 1101-1557 *passim*. The interest in uniform application of a facially neutral criminal law is acute: "To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos." *United States v. Moylan*, 417 F.2d 1002, 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 910, 90 S.Ct. 908, 25 L.Ed.2d 91 (1970). Finally, we emphatically reject appellants' suggestion that because enforcement of the border control laws has not been particularly successful, there is no compelling state interest in prosecuting violators. The argument is so broadly couched that it could be used to deny a compelling state interest in enforcement of the criminal drug laws. In any event, to the extent that appellants' conduct, amplified by the nationwide publicity given to the "sanctuary movement," has contributed to undermining compliance with the border control laws and encouraging illegal entries, appellants are trying to excuse their violation of law on the basis of other violations. This will not do. The compelling state interest becomes more compelling in proportion to the increasing magnitude of the violations.[4]

[6] The third prong of the *Yoder* test requires consideration of any less restrictive alternative means whereby the appellants' interest in upholding their religious beliefs may be accommodated within government policy. Appellants assert that criminalizing their efforts to abet the illegal entry of El Salvadorans is "almost never" the least restrictive means. They suggest as "less restrictive" the deportation of the alien or even confiscation of vehicles. Deporting the aliens, as an alternative policy, would reduce appellants' efforts to a pitiful farce. It would also implicate the Border Patrol in a wasteful "catch-me-if-you-can" scheme that would not further the law's objectives. Confiscation of vehicles would be a

[4] It is unnecessary to speculate whether, in abstract terms, illegal immigration can be judged good or bad for the country. Congress had determined the distinction between entry which is legal and that which is illegal. Neither appellants nor this court can be so bold as to revise the legislative determination.

futile remedy, imposing a tax on those who contribute to Merkt's and Elder's efforts, without, in all likelihood, diminishing the quantity of their efforts to evade the law. In short, appellants' proffered "less restrictive alternatives," by their very triviality, highlight the necessity for criminal sanctions.

An even more basic objection to requiring the government to adopt a less restrictive alternative that would protect the appellants' choice of religious practices is the open-endedness of their demand. Judge Head eloquently captured the ramifications of appellants' position in the following analysis:

> If the Government attempted to accommodate into its immigration policy [appellants'] religious beliefs, the Government's efforts would result in no immigration policy at all. As testimony from [appellants'] witnesses indicated, the moral obligation to assist others crosses religious and denominational lines. These widely-held belief allow adherents to exercise considerable discretion and would permit religious individuals to form personal immigration policies. . . . [Appellants wish] to limit this Court's view solely to the violence in El Salvador; however, the human condition remains miserable in many parts of the globe. Man's inhumanity to man, as well as nature's, has been unrelenting throughout history. Many people live on this planet who logically are no less worthy of [appellants'] Christian charity than the Salvadorans. The consciences of other religiously motivated may conclude that the starving and impoverished of North Africa, Asia, or Mexico are equally entitled to enter this country without review by the INS.

United States v. Elder, 601 F. Supp. 1574, 1579 (S.D. Tex. 1985).[5]

Appellants' "do it yourself" immigration policy, even if grounded in sincerely held religious conviction, is irreconcilably, voluntarily, and knowingly at war with the duly legislated border control policy. In this case, the claims of conscience must yield to the twin impera-

[5]Judge Vela adopted Judge Head's opinion in denying the appellants' motions to dismiss.

tives of evenhanded enforcement of criminal laws and preservation of our national identity as defined by the immigration laws.

II.

SUGGESTIVE IDENTIFICATION PROCEDURES

Elder and Merkt next assert that Mendez-Valle's pre-trial and in-court identifications were inadmissible because the photographic identification procedures were impermissibly suggestive and created a substantial risk of misidentification.[6] Prior to trial, the appellants moved to suppress the photographic identification evidence. After an evidentiary hearing, the district court found that the photo array of male suspects was not unnecessarily suggestive. With respect to Merkt, however, the court found the photo array to be "disastrous." The court nevertheless held that Mendez-Valle's indentification of Merkt was sufficiently reliable to outweigh the corruptive effect of the suggestive photographic array. At trial, Mendez-Valle made in-court identifications of both appellants.

[7] Evidence of a pretrial photographic identification will be inadmissible only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968). Elder asserts that the male photo array was impermissibly suggestive because his photograph was the only one that even remotely resembled the very general description given by Mendez-Valle at the outset of the interview. We are unable to conclude that the district court was clearly erroneous in its determination that the male photographic array was not unnecessarily suggestive. *See United States v. Diecidue*, 603 F.2d 535, 565 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980).

At the Border Patrol station in McAllen, Mendez-Valle described the man who had met and transported them to the Casa Oscar Romero as a tall man with a mustache who possibly wore glasses and had a name phonetically similar to "Mr. Mack" or "Mr. Yack."

[6] Roseles-Cruz was unable to identify the appellants from the photographs and could not identify them at trial.

(Elder is known as "Jack.") Mendez-Valle also indicated that, while in Mexico, he was aided by a religious organization. Based on this information, the agents compiled a photographic lineup. Because the agents did not have access to a regular photograph of Elder, they clipped his picture from a newspaper and included in the lineup pictures of other men also taken from a newspaper. In addition to the seven newspaper clippings were four "hard" photos of men, three of whom appeared to be of Hispanic descent.

Even excluding the four "hard" photographs, the remaining seven newspaper clippings depicted caucasian males of varying facial and feature characteristics but of the same general age and description. Three of the men in the newspaper clippings wore glasses, while two had mustaches. Mendez-Valle testified that no one suggested any certain photograph to him but that he pointed out Elder's photograph because "that looked very much like Mr. Mac." Based on these facts, the male photographic array was not impermissibly suggestive.

[8] The female photographic array consisted of eight "hard" photographs. Seven of the photographs were in color and depicted women of obvious Hispanic origin. Merkt was the only caucasian female in the array and her photograph was in black and white. The government concedes that the female photographic array was impermissibly suggestive. Nevertheless, the district court found that other factors weighed in favor of the reliability of Mendez-Valle's identification of Merkt and outweighed the effects of the impermissibly suggestive photo identification. We agree.

In *Simmons*, the Supreme Court held that if a photo array was unnecessarily suggestive, the court must then determine whether, under the totality of the circumstances, the suggestiveness leads to a substantial likelihood of irreparable misidentification. 390 U.S. at 384-86, 88 S.Ct. at 971-72, 19 L.Ed.2d at 1253-54. Under this analysis, "reliability is the linchpin in determining the admissibility of identification testimony." *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S.Ct. 2243, 2253, 53 L.Ed.2d 140, 154 (1977). *See United States v. Cueto*, 611 F.2d 1056, 1063-64 (5th Cir. 1980). A pretrial identification found to be reliable will be admitted despite an impermissibly suggestive photographic array.

BEST AVAILABLE COPY

BEST AVAILABLE COPY

This Circuit relies on six factors to determine the reliability of a pretrial identification: (1) the opportunity of the witness to view the suspect, (2) the witnesses' degree of attention, (3) the accuracy of the pre-identification description, (4) the witnesses' level of certainty, (5) the time that has elapsed between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself. *United States v. Woolery*, 735 F.2d 818, 821 (5th Cir.), *reh'g denied*, 740 F.2d 359 (1984), *cert. denied*, — U.S. —, 105 S.Ct. 1172, 84 L.Ed.2d 322 (1985). "[T]he fact that some, or even a majority, of the *Manson* factors weigh against the reliability of the identification is not conclusive. We must examine all of the factors and decide, whether, on the whole, the suggestiveness of the line-up created a 'very substantial risk of misidentification.' " 740 F.2d at 360-61 (quoting *United States v. Atkins*, 698 F.2d 711, 713 (5th Cir. 1983)).

1. *The opportunity to view the suspect.* Mendez-Valle testified that he saw Merkt a few times at the Casa Oscar Romero, that he asked her to purchase five bus tickets, and that he gave her $100. Mendez-Valle further testifed that, on November 21, 1984, Merkt gave him five bus tickets and drove the aliens to the bus station, which was approximately twenty minutes from Casa Oscar Romero. Mendez-Valle had the opportunity to view Merkt during the day at close range for substantial periods of time. *See, e.g., Woolery*, 735 F.2d at 821; *Passman v. Blackburn*, 652 F.2d 559, 570 (5th Cir. 1981), *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982); *Allen v. Estelle*, 568 F.2d 1108, 1113-14 (5th Cir. 1978).

2. *Degree of attention.* Mendez-Valle presented Merkt with what was probably a great deal of money to him. Merkt was the individual who paved the way for the aliens' journey to Houston. From these facts, we can conclude that Mendez-Valle's attention was often singularly focused on her. *See, e.g., Passman*, 652 F.2d at 570-71; *Swicegood v. Alabama*, 577 F.2d 1322, 1328 (5th Cir. 1978).

3. *The accuracy of the pre-identification description.* Mendez-Valle described Merkt as a short Anglo or light-skinned woman with curly or kinky yellowish-blond hair. He said her name was phonetically similar to "Daisy." Although perhaps general in terms of providing a "measuring stick" for comparison, this was an accu-

rate description of Merkt. Mendez-Valle did, in addition, provide an accurate description of Merkt's car. *See, e.g., Allen,* 568 F.2d at 1114.

4. *The witness' level of certainty.* Mendez-Valle testified that he picked Merkt's picture from the lineup "[b]ecause it looked very much like [Daisy]." At the evidentiary hearing, in response to a question by the court, Mendez-Valle testified that, even if he had not seen the picture of Merkt, he believed he would have been able to identify her. At trial, Mendez-Valle positively and unequivocably identified Merkt. *See, e.g., United States v. Jennings,* 528 F.2d 222, 223 (6th Cir. 1975). *Cf. Cueto,* 611 F.2d at 1064 (no in-court identification of the defendant).

5. *The time between the crime and the confrontation.* Mendez-Valle was asked to describe Merkt and identify her photograph only hours after the aliens had been placed on the bus. *See, e.g., Allen,* 568 F.2d at 1114. Thus, there was no substantial passage of time which could have affected the reliability of the identification.

Virtually all of these factors indicate a reliable basis for the identification. Because the suggestive photographic array did not create a substantial risk of an inaccurate identification, the pretrial identification evidence against Merkt was properly admitted.

Under the totality of the circumstances, Mendez-Valle's in-court identifications of Elder and Merkt were reliable also. Mendez-Valle testified as to the length of time he spent with each appellant and the conditions under which he viewed them. At trial, Mendez-Valle said that Elder resembled the man who had helped them and he positively identified Merkt. Defense counsel challenged the basis for both the pretrial and in-court identifications during his closing arguments. The credibility of those identifications was properly left to the jury. *See United States v. Fernandez-Roque,* 703 F.2d 808, 814 (5th Cir. 1983).[7]

[7]The appellants also assert that the identification procedures were impermissibly suggestive because Mendez-Valle and Rosales-Cruz were shown a video tape in which the female dominantly portrayed was Merkt. This video tape was only shown to the aliens after Mendez-Valle had already described Merkt and picked her photo from the lineup and after Rosales-Cruz was unable

III.

RECUSAL OF THE TRIAL COURT JUDGE

Prior to trial, Elder and Merkt moved for the recusal of the trial court judge, the Honorable Filemon B. Vela, pursuant to 28 U.S.C. §§ 144 and 455. The motion was denied by Judge Vela initially and upon reconsideration. On appeal, appellants assert that Judge Vela abused his discretion in refusing to recuse himself because (1) he had acknowledged his personal bias by recusing himself, upon his own motion, in another case in which Elder was the defendant, and (2) he improperly considered the truth of the matters alleged in affidavits submitted under § 144 rather than merely passing upon the legal sufficiency of those affidavits.

[9] A motion for recusal is committed to the sound discretion of the trial judge. The denial of such a motion will not be reversed on appeal unless the judge has abused his discretion. *See United States v. Harrelson*, 754 F.2d 1153, 1165 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985). Under both § 144 and § 455, the alleged bias or prejudice must be personal and it must stem from an extrajudicial source which would result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. *See United States v. Reeves*, 782 F.2d 1323, 1325 (5th Cir. 1986).

Judge Vela's disqualification was not required under § 455 merely because he voluntarily withdrew from another case in which Elder was the defendant.[8] *See, e.g., Davis v. Fendler*, 650 F.2d 1154,

---

to identify either Elder or Merkt. After viewing the video tape, Rosales-Cruz was still unable to identify anyone on the tape and Mendez-Valle again identified Merkt. In light of these facts, and our finding that the pretrial identification procedures were reliable, we cannot conclude that the video tape had any effect on the ability of the aliens to identify Merkt.

[8]Under § 455(a), a judge must disqualify himself in any proceeding in which "his impartiality might reasonably be questioned." Under § 455(b)(1), a judge must also disqualify himself where he has a "personal bias or prejudice concerning a party." If the evidence shows that a reasonable person "would harbor doubts about the judge's impartiality," the trial judge must disqualify himself. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980).

1163 (9th Cir. 1981). Judge Vela gave no reason for his withdrawal from that case, other than to state that it was "for none of the reasons urged by the Defendant in his Motions." In this case, Judge Vela considered, and specifically rejected, recusal based on his prior recusal. The appellants have not shown, by affidavit or otherwise, that Judge Vela's impartiality might reasonably be questioned or that he had a personal bias or prejudice against either Elder or Merkt or in favor of the government. These facts do not indicate that a reasonable person would harbor doubts about Judge Vela's impartiality based solely on his prior recusal. *See Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1019-20 (5th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 483 (1982).

Section 144 provides, in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144. If an affidavit filed under § 144 is timely and technically correct, the factual allegations must be taken as true for purposes of recusal. The trial judge may pass only upon the legal sufficiency of the affidavit;[9] he may not consider the truth of the matters asserted therein. *Joint Legislative Comm.*, 637 F.2d at 1019 & n.6.

Merkt, in her affidavit, refers primarily to statements and rulings made by Judge Vela during her trial and sentencing in a previous case.[10] These prior judicial rulings, however, offer no basis for

[9] An affidavit is legally sufficient if it meets a three-part test: (1) the facts must be material and stated with particularity; (2) the facts must be such that, if true, they would convince a reasonable person that bias exists; and (3) the facts must show that the bias is personal, rather than judicial, in nature. *Joint Legislative Comm.*, 637 F.2d at 1019. *See Parrish v. Bd. of Comm'rs*, 524 F.2d 98, 100 (5th Cir.1975) (*en banc*), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). Each party may submit only one such affidavit. 28 U.S.C. § 144.

[10] *See United States v. Merkt*, 764 F.2d 266 (5th Cir.), *reh'g denied*, 772 F.2d 904 (1985).

recusal; they do not show any personal bias against Merkt. Elder's affidavit asserts prejudice on the basis of Judge Vela's prior recusal. We have already rejected this ground. Additional allegations center on the statements made by Judge Vela during the previous trial and sentencing of Merkt. Again, these prior judicial rulings do not show any personal bias.

Finally, the appellants assert that Judge Vela should have recused himself because of religious pressure. In support of this contention, Merkt refers to the affidavit of Diane Elder, the wife of John Elder. Diane Elder's affidavit violates the one-affidavit rule of 28 U.S.C. § 144 and need not be considered. *See United States v. Balistrieri*, 779 F.2d 1191, 1200 & n.6 (7th Cir. 1985) (a court need only consider the first affidavit submitted in support of a § 144 motion), *cert. denied*, — U.S. —, 106 S.Ct. 1490, 89 L.Ed.2d 892 (1986). Even if its filing were appropriate, Diane Elder's affidavit, based, as it is, on information told to her by unnamed individuals who did "not feel capable of giving affidavits," is legally insufficient to require the recusal of Judge Vela on religious grounds. *Id.* at 1199 (affidavits based on mere conclusions, opinions, or rumors are legally insufficient to require recusal). *See also Davis v. Comm'r*, 734 F.2d 1302, 1303 (8th Cir. 1984).[11]

IV.

COERCED TESTIMONY

The appellants timely moved to dismiss the indictment based on government coercion and misconduct. On appeal, the appellants contend that their fifth amendment right to due process was violated when the district court failed to hold an evidentiary hearing on the voluntariness of the testimony of the alien witnesses.

[10] It is established in this Circuit that "the admission at trial of

[11] Both appellants also incorporate, by reference, the affidavits of other individuals in support of their motion for recusal. In addition to violating § 144's one-affidavit rule, we note that these affidavits are also predicated on Judge Vela's religious background and his rulings in Merkt's previous trial, evidence no personal bias or extrajudicial prejudice, and are legally insufficient to require recusal.

a coerced out-of-court statement from a non-defendant may violate the defendant's right to a fair trial as guaranteed by the due process clause of the fifth amendment." *Merkt*, 764 F.2d at 274. *See also United States v. Chiavola*, 744 F.2d 1271, 1273 (7th Cir. 1984); *LaFrance v. Bohlinger*, 499 F.2d 29, 35 (1st Cir.), *cert. denied*, 419 U.S. 1080, 95 S.Ct. 669, 42 L.Ed.2d 674 (1974). The voluntariness of the statement of a witness is generally determined in a pretrial suppression hearing. *See, e.g., Merkt*, 764 F.2d at 273; *LaFrance*, 499 F.2d at 36. Here, however, defense counsel indicated that he wished to carry the motion with the case, and testimony was presented at trial regarding the voluntariness of the statements of Mendez-Valle and Rosales-Cruz.

The appellants first assert that Mendez-Valle's testimony was coerced with promises that he and the children would be sent to Washington, D.C., if he testified favorably to the government. At the outset of his testimony, Mendez-Valle stated that he wanted to request a "condition" from the government. At that point, the jury was excused and the proceedings continued. Mendez-Valle stated that, when he was detained, the government promised him that the children would be reunited with their parents in Washington, D.C. The government denied making any such promise but acknowledged that, when Mendez-Valle had asked what would happen to the children, he had been told that the children would be held until their parents could be located. At the time of trial, the children remained in the government's custody because no one had come forward to accept responsibility for them. Mendez-Valle stated that no other promises or threats had been made and the court ordered him to testify. On cross-examination, Mendez-Valle stated his belief that if he gave the Border Patrol agents answers that they liked, they would let them go to Washington, D.C. However, Mendez-Valle elsewhere indicated that, despite this belief, he nevertheless told the truth.

Appellants assert, based on the fact that the border patrol agents told the alien witnesses the names of the appellants, that the government impermissibly suggested specific testimony. While the agents did inform the alien witnesses of the names of the appellants, this was done only after the witnesses had described the appellants, after Mendez-Valle had picked both of the suspects from the photographic arrays, and after the aliens had both given

the agents their phonetic understanding of the names of the individuals who had helped them.

[11] The facts presented at trial did not warrant an evidentiary hearing. Neither witness claimed that he or she was threatened or coerced into making untrue statements. Other than concern for the children, both witnesses testified that no promises were made in exchange for their testimony. Furthermore, even if one of the government agents did bang his fist on the table twice while questioning Rosales-Cruz, as suggested by defense counsel, such actions would not lead this court to conclude that the entire trial testimony of the aliens should be excluded. In *United States v. Fredericks*, 586 F.2d 470 (5th Cir. 1978), *cert. denied*, 440 U.S. 962, 99 S.Ct. 1507, 59 L.Ed.2d 776 (1979), the defendant moved to exclude the testimony of an unindicted co-defendant. The witness' testimony was obtained in violation of her *Miranda* rights and, according to the witness' uncontroverted testimony, only after being subjected to threatening and heavy-handed interrogation. *Id.* at 477. Refusing to exclude the witness' testimony, this court held that the actions of the government officials, "even if viewed in the worst possible light, were a far cry from the sort of third-degree physical or psychological coercion that might prompt us to disregard altogether the societal interest in law enforcement by excluding the highly probative testimony of a nondefendant." *Id.* at 481. In this case, we can find no reason to exclude the trial testimony of the alien witnesses.

V.

EVIDENCE OF A PRIOR CONVICTION

Merkt was previously convicted of conspiring to transport, and of transporting, illegal aliens. *See Merkt*, 764 F.2d at 268.[12] That conviction was the subject of a motion *in limine*, which was granted to the extent that the government was required to get permission from the court prior to introducing evidence of that conviction. While cross-examining one of the defense witnesses, the prosecutor elicited testimony regarding the previous conviction without prior

[12]On appeal, this court reversed that conviction and remanded the case for a new trial. *Merkt*, 764 F.2d at 275. On remand, the government elected not to retry Merkt and dismissed the indictment.

approval of the court. The district court summarily found the conviction admissible under Fed. R. Evid. 404. The court carefully admonished the jury, however, as to the purposes for which the conviction could be considered. Merkt challenges the introduction of the prior offense evidence.

[12] Rule 404(b) provides that evidence of other crimes is not admissible to prove the character of a person in order to show that she acted in conformity therewith, but may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The admissibility of extrinsic evidence is determined in light of the two-part test established by this court in *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979): (1) it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant's character, and (2) the evidence must possess probative value that is not substantially outweighed by its undure prejudice.[13] A trial court's decision to admit extrinsic offense evidence will be rejected only for an abuse of discretion. *See United States v. Maggitt*, 784 F.2d 590, 597 (5th Cir. 1986).

Merkt first asserts that admission of evidence of the prior conviction was improper because the government was trying to establish her identity. This assertion is frivolous. The trial court, in admonishing the jury as to the limited use of the extrinsic offense evidence, cautioned that Merkt's previous conviction could be considered only in determining Merkt's state of mind or intent and "for no other purpose."

Merkt next asserts that admission of the extrinsic offense evidence as bearing upon her knowledge or intent is irrelevant because her sole defense in this case was misidentification. It is clear, however, that "Rule 404(b) evidence is particularly probative where the government has charged conspiracy." *United States v. Gordon*, 780 F.2d 1165, 1174 (5th Cir. 1986).

[13]The extrinsic offense evidence must also meet the other requirements of Fed. R. Evid. 403, which provides that, although relevant, extrinsic offense evidence may be excluded if it will confuse the issues, mislead the jury, or cause undue delay, waste of time, or needless presentation of cumulative evidence.

> "In the context of a conspiracy case, the mere entry of a not guilty plea sufficiently raises the issue of intent to justify the admissiblility of extrinsic offense evidence .... Only when the defendant affirmatively takes the issue of intent out of the case is he entitled to an exclusion of the evidence.

Id. See United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980). Here, Merkt did nothing from which this court could conclude that she affirmatively took the issue of intent out of her case. *See, e.g., Id.* at 383 n.2 ("a defendant who intends to assert a defense based upon mistaken identity may make an appropriate stipulation to avoid the introduction of extrinsic offense evidence").

[13] Merkt also contends that a remand is mandatory because the district court allowed the admission of the extrinsic offense evidence without a prior on-the-record determination that the probative value of the evidence outweighed its prejudicial effect. In *United States v. Robinson*, 700 F.2d 205 (5th Cir. 1983), *cert. denied*, 465 U.S. 1008, 104 S.Ct. 1003, 79 L.Ed.2d 235 (1984), this court held that:

> [I]n Rule 404(b) cases an on-the-record articulation by the trial court of *Beechum's* probative value/prejudice inquiry [is warranted] *when requested by a party.* In the absence of on-the-record findings *in response to such a request*, we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling.

Id. at 213 (emphasis added; footnote omitted).

Robinson's requirement of a prior on-the-record articulation of the probative value/prejudice analysis is only triggered by the request of a party. Here, defense counsel made no specific request for an on-the-record probative value/prejudice determination. Because the district court subsequently made the probative value/prejudice evaluation,[14] this contention, like the others, fails to per-

[14]Further, although the appellants do not specifically challenge the district court's post-trial findings, we find that the extrinsic evidence was relevant to

suade. *Cf. United States v. Lavelle*, 751 F.2d 1266, 1279 (D.C. Cir.) ("no reversal or remand is warranted unless the trial court refuses to make an on-the-record determination *in response to such a* request"), *cert. denied*, — U.S. —, 106 S.Ct. 62, 88 L.Ed.2d 51 (1985) (emphasis in original).[15]

VI.

REFUGEE STATUS

[14] Section 1324 makes it unlawful for a person to assist an alien who is "not lawfully entitled to enter or reside within the United States." 8 U.S.C. § 1324(a). The appellants assert that El Salvadorans, as nationals of a country torn by internal conflict, are "refugees" entitled to sanctuary in the United States and, thus, are not "illegally" within its borders. Since the aliens' status is an element of the crime charged, the appellants assert that whether the aliens are refugees entitled to remain in the United States is a question of fact which should have been submitted to the jury.

Appellants first contend that the aliens are entitled to "reside" in the United States pursuant to the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102. This inventive argument was previously rejected by this court in *United States v. Pereira-Pineda*, 721 F.2d 137, 139 (5th Cir. 1983). We are bound by our own precedent.

Appellants also assert that the United States' accession to the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967 [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577, creates for all

---

Merkt's knowledge or intent and that the substantive value of the extrinsic evidence outweighed its possible prejudicial effect.

[15]The admission of the extrinsic offense evidence prior to court approval was in violation of court order. However, the government actions did not rise to the level of prosecutorial misconduct. It appears from the record that the initial injection of the prior conviction information was inadvertent. The evidence was properly admitted under Fed. R. Evid. 404(b) and, thus, the appellants can show no prejudice. Further, the jury was carefully instructed on the limited purpose for which the evidence could be considered. While we in no way condone the government's misstep, the appellants suffered no harm and the prosecutor was properly reprimanded by the trial court.

"refugees" an "entitlement" to "reside" in the United States. Even though the Protocol bound the signatories to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), the Supreme Court has held that accession to the Protocol did not create new rights or substantially alter existing domestic immigration and refugee law. *See I.N.S. v. Stevic*, 467 U.S. 407, 417-18, 428-29 n.22, 104 S.Ct. 2489, 2494-95, 2500 n.22, 81 L.Ed.2d 321, 330-32, 336-37 n.22 (1984). *See also Bertrand v. Sava*, 684 F.2d 204, 218 (2d. Cir. 1982); *Pierre v. United States*, 547 F.2d 1281, 1288-89 (5th Cir.), *vacated and remanded for consideration of mootness*, 434 U.S. 962, 98 S.Ct. 498, 54 L.Ed.2d 447 (1977). Thus, even if the aliens are refugees, the Protocol does not permit them to "reside" here contrary to domestic law or for purposes of 8 U.S.C. § 1324(a).[16]

VII.

JURY INSTRUCTIONS

[15] To establish a violation of 8 U.S.C. § 1324(a)(2), the government must prove, *inter alia*, that the defendants acted willfully in furtherance of the aliens' violation of the law. *See Merkt*, 764 F.2d at 270. Although the appellants challenge the district court's refusal to give their proffered instruction on the "furtherance" element of the offense,[17] we find no reversible error in this instruction.

---

[16]Amici urge this court to provide sanctuary, and thus legal status, to the aliens based on "custom" under international law. In enacting our refugee statute, however, Congress was not bound by international law, much less a purported "custom" of international law. *See, e.g., United States v. Quemener*, 789 F.2d 145, 156 (2d Cir. 1986); *United States v. Allen*, 760 F.2d 447, 454 (2d Cir. 1985); *United States v. Pinto-Mejia*, 720 F.2d 248, 259 (2d Cir. 1983), *modified on other grounds*, 728 F.2d 142 (1984).

[17]The appellants submitted the following instruction on "furtherance":

> The phrase "in furtherance of such violation" means that the conduct involved was done with the specific intent of furthering the individual's ability to remain in the United States in violation of law. It is not enough that the transportation was incidental to, or merely permitted the person to maintain his or her illegal presence here. In order to constitute "furtherance" in violation of 8 U.S.C. § 1324(a)(2), the transportation must be directly and substantially related to the individual's ability to avoid detection.

In *Merkt*, this court, for the first time, directly examined the requirement under § 1324(a)(2) that the defendant act willfully in furtherance of the aliens' violation of law. 764 F.2d at 271. This court held that:

> For the government to show that Merkt transported the aliens willfully "in furtherance of [their] violation of law," as the statute requires, it must show "a direct and substantial relationship between that transportation and its furtherance of the alien's presence in the United States." Willful transportation of illegal aliens is not, per se, a violation of the statute, for the law proscribes such conduct only when it is in furtherance of the alien's unlawful presence. The jury must be instructed that proof of this element of the offense is prerequisite to conviction.

Id. at 271-72 (footnote omitted). Here, the court instructed the jury that, in order to find the appellants guilty, it must find

> that the transportation of the alien was done willfully in furtherance of the alien's violation of law; that is, to further the alien's illegal presence in the United States. Just incidental transporting [of] an illegal alien will not make you guilty of that offense. It has to be something that furthers that person's illegal presence in the United States.

The court's instruction substantially covers the instruction requested by the appellants and, in substance, embodies the principles expressed in *Merkt*. While the court's instruction in this case does not use the words "direct and substantial relationship," the court's instruction makes clear that mere or incidental transportation of an alien is not sufficent to sustain a conviction under § 1324(a)(2). The court instructed that the jury must find that the transportation of the aliens was done willfuily and in furtherance of the aliens' illegal presence in the United States. When viewed as a whole, this instruction satisfies the text in *Merkt*. We find the appellants' remaining challenges to the jury instructions to be without merit.[18]

[18]The appellants' assertion that they were entitled to a good faith belief instruction is, in essence, a mistake of law defense which was foreclosed by this

VIII.

SUFFICIENCY OF THE EVIDENCE

[16] The appellants assert that the evidence was insufficient to sustain their convictions. Having reviewed all the evidence and the inferences which may be drawn therefrom in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704 (1942), we must conclude that it was sufficient to sustain the convictions of both Elder and Merkt.

AFFIRMED.

---

court in *Merkt*, 764 F.2d at 273. *But see Merkt*, 764 F.2d at 275 (Rubin, J., dissenting). The appellants' assertion that they were entitled to a religious defense instruction has been foreclosed by our holding that they had no religious defense. Finally, the court's charge on conspiracy was adequate. *See United States v. Martin*, 790 F.2d 1215, — (5th Cir. 1986).

IV

Denial of Suggestion for En Banc Review

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2264

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STACEY LYNN MERKT and
JOHN B. ELDER,

Defendants-Appellants

Appeal from the United States District Court for the Southern District of Texas

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 17, 1986, 5 Cir., 198_,

_____F.2d____)

(September 4, 1986)

Before WILLIAMS, GARWOOD and JONES, Circuit Judges

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc,

(Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause enbanc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

REHG-6

U.S. COURT OF APPEALS

F I L E D

9-4-86

V

Motion to Fifth Circuit to comply with rules regarding En Banc Review and Recall of Mandate denied.

U.S. COURT OF APPEALS
F I L E D
OCT 7, 1986
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-2264

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STACEY LYNN MERKT and
JOHN B. ELDER,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

IT IS ORDERED:

that appellants' motion for recall of mandate, to vacate this Court's order of September 4, 1986 denying petition for rehearing and suggestion for rehearing en banc, and for an order directing the suggestion for rehearing en banc previously filed to be recirculated to all active Judges of the Court, etc., is Denied.

As the order denying petition for rehearing and for rehearing en banc stated, no

judge in active service requested an en banc poll, although all were fully notified of appellants' motion. Also, pursuant to 5th Circuit Local Rule 41.1, it is not this Court's practice to stay the mandate in criminal cases except in unusual circumstances, which are not present in this case.

Edith H. Jones,
U. S. Circuit Judge

VI

Extension to December 3, 1986 to file Petition for Certiorari granted by the Honorable Justice Byron White.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK

WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

October 28, 1986

Stephen W. Cooper, Esquire
c/o Neighborhood Justice Center
500 Laurel Avenue
St. Paul, MN 55102

Re: Stacey Lynn Merkt and John B. Elder v. United States, A-308

Dear Mr. Cooper:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice White, who on October 28, 1986, signed an order extending your time to and including December 3, 1986.

A copy of the Justice's order is enclosed.

Very truly yours,
JOSEPH F. SPANIOL, JR., Clerk
By

Francis J. Lorson
Chief Deputy Clerk

vjr

Enc.

cc: Hon. Charles Fried, Solicitor General

Clerk, U.S. Court of Appeals for the Fifth Circuit

(Your No. 85-2264)